

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Developing a Unified Inter-carrier)	CC Docket No. 01-92
Compensation Regime)	

**INITIAL COMMENTS OF THE
SOUTH DAKOTA PUBLIC UTILITIES COMMISSION**

The South Dakota Public Utilities Commission ("SDPUC") submits these comments regarding the Federal Communications Commission's ("Commission") further notice of proposed rulemaking that addresses the development of a unified intercarrier compensation regime.¹ In its *FNPRM*, the Commission requests comments on how to "replace the existing patchwork of intercarrier compensation rules with a unified approach."² The SDPUC comments will note some of the advantages and disadvantages of some of the filed plans and evaluate them in light of five basic principles. A very specific issue that the SDPUC would like to highlight is the treatment of centralized equal access providers. The SDPUC is concerned that some plans unfairly penalize our rural carriers for the use of a centralized equal access tandem.³

I. INTRODUCTION

The SDPUC is a three member state regulatory commission that regulates certain aspects of the telecommunications industry in South Dakota. Although the SDPUC has found that many of the telephone services traditionally regulated by state commissions are now competitive in South Dakota, one of the services that remains

¹ In the Matter of Developing a Unified Inter-carrier Compensation Regime, *Further Notice of Proposed Rulemaking*, CC Docket No. 01-92, (rel. March 3, 2003) ("*Inter-carrier Compensation FNPRM*" or "*FNPRM*").

² *Inter-carrier Compensation FNPRM* at 3, para. 3.

³ The SDPUC discusses this issue on pages 6-7.

classified as noncompetitive is intrastate switched access rates. The SDPUC approves the rates, terms, and conditions for intrastate switched access services. Thus, the SDPUC is very aware of the difficulties in setting intercarrier compensation rates – difficulties that are compounded by the Commission’s ambitious goal of attempting to unify the various, conflicting compensation regimes. The SDPUC commends the Commission for tackling these complicated and contentious issues.

In making the following comments, the SDPUC seeks to provide the Commission with the viewpoint of a regulatory agency located in a sparsely populated, rural state. Given South Dakota’s sparse population and wide open spaces, our telephone companies face many challenges in serving our state. These challenges are often difficult for those who live in more densely populated areas to comprehend. In order to put these challenges into perspective, the SDPUC notes that many of our rural telephone companies have very few subscribers per mile. For example, Golden West Telecommunications Cooperative has only 1.04 subscribers per route mile of facility.

To date, many of our incumbent telephone companies have responded admirably to the challenges of serving our state. Notably, our rural LECs banded together to create a centralized equal access network, the South Dakota Network, LLC (“SDN”). SDN now has nine repetitive fiber rings in South Dakota that are supported with SS7 signaling and provide the state with redundancy to ensure continuous service. Moreover, many of our incumbent LECs are able to offer advanced services to their customers.

The point of noting the accomplishments of our telephone carriers is to highlight a fact that is simple yet sometimes appears to be glossed over or minimized -- namely, that our network infrastructure requires considerable funding. This funding is needed not only to operate and maintain our network but to continually improve the underlying infrastructure for the benefit and use of other telecommunications providers and our

consumers. This fact leads to an obvious point – that the use of the infrastructure by others requires compensation. The SDPUC will continue to emphasize this point throughout its comments.

III. GOALS OF A UNIFIED COMPENSATION REGIME

The *Intercarrier Compensation FNPRM* describes a number of industry proposals that were put forth by various groups.⁴ One such proposal was set forth by the National Association of Regulatory Commissions (“NAURC”).⁵ In its *FNPRM*, the Commission noted with approval “the work done by NARUC in developing a set of principles that can be used in evaluating these proposals.”⁶ In particular, the Commission referenced the goals of a plan that: 1) is simple to administer; 2) is competitively and technologically neutral; 3) minimizes arbitrage opportunities; 4) ensures reasonable and affordable rates, especially for rural consumers; and 5) minimizes the impact on universal service support programs.⁷ The SDPUC also supports these goals and will evaluate aspects of some of the proposed plans in light of these goals.

A. Simplicity

The virtues of simplicity with regard to intercarrier compensation are obvious – a system that has the same rate for similar traffic is a system that is much easier to implement and administer, with far fewer opportunities for arbitrage. Yet, notwithstanding simplicity’s admirable attributes, simplicity is not an easily attainable goal. In the case of intercarrier compensation, simplicity is, in some instances, trumped by the law. One of those instances regards intrastate switched access rates. Although the *Intercarrier Compensation FNPRM* cites to a number of legal theories under which

⁴ *Intercarrier Compensation FNPRM* at 20, para. 39.

⁵ *Id.*

⁶ *Id.* at 31, para. 61.

⁷ *Id.*

the Commission could attempt to take jurisdiction over intrastate switched access rates, all of the theories must fall to the state commission's clear jurisdiction over these intrastate rates.⁸

However, the SDPUC recognizes that non-uniform intrastate switched access rates will frustrate the goal of simplicity, in addition to the goal of competitive and technological neutrality. Thus, the SDPUC is interested in working with the Commission to establish uniform rates, including intrastate switched access rates. We believe that any attempt to preempt the states will only lead to extensive litigation. Instead, the Commission should consider proposals, such as NARUC's, which provide for voluntary participation by a state commission in a unified system of access charges.⁹ The NARUC proposal sets forth various incentives to encourage state participation. For example, a state commission that chooses to participate in a unified intercarrier charge system would be able to "determine the allocation of funds within its State, subject to FCC guidelines and review."¹⁰ The SDPUC encourages the Commission to work with the states and adopt a regime that recognizes the states' continuing jurisdiction over intrastate access charges and provides the states with strong, but fair incentives for voluntary participation in a unified intercarrier system.

B. Competitively and Technologically Neutral

Closely tied to simplicity is the goal that any new regime be competitively and technologically neutral. For example, if every toll minute or capacity unit is charged the same rate, the imposition of those rates is less administratively burdensome (i.e. simple), and is also competitively and technologically neutral. However, for some proposals the goal of simplicity must give way to the goal of competitive neutrality. One

⁸ See *Smith v. Illinois Bell Telephone Co.*, 282 U.S. 133, 148-149 (1930).

⁹ NAURC Task Force Proposal, Version 7, at 12.

¹⁰ *Id.* at 10.

such proposal is bill and keep. As explained in more detail below, the SDPUC opposes the implementation of bill and keep. In addition, the SDPUC will highlight another proposal that would directly and detrimentally affect our telephone companies by penalizing carriers that have established a centralized equal access tandem.

1. The imposition of bill and keep will harm our rural telephone companies

Although some plans tout the advantages of bill and keep in achieving the goal of competitive and technological neutrality, the SDPUC strongly believes that mandatory bill and keep is not the answer, especially in a rural state such as South Dakota. The SDPUC agrees with the Expanded Portland Group (“EPG”) that bill and keep *can* work when traffic is relatively balanced and network costs are relatively equal but *does not* work when dealing with rural networks which are more costly and present unbalanced traffic patterns. As the EPG explains:

Bill and Keep could compromise universal service in RLEC serving areas by eliminating a vital source of cost recovery, and placing increasing pressure on overburdened universal service funding mechanisms and rural consumers. RLECs have high per unit operating costs in part because they serve sparsely populated territories. The provision of rural access services often involves transporting traffic for long distances over low volume routes. Both of these factors are responsible for costs in many rural areas that are significantly higher than similar services in urban areas. To cover the costs of operating these networks, and to provide RLECS with the ability and incentive to invest to grow their networks, any access revenue shortfall must be made up by either end-user rates increases or through the universal service fund. Bill and Keep would lead either to unacceptably large increases in end-user charges or over-reliance on universal service funding that is already under market and political pressure. Maintaining intercarrier charges for network use in high-cost rural areas spreads the cost recovery risk over three revenue sources (carriers, end user, and USF) rather than just two sources (end user and USF).¹¹

The SDPUC agrees that elimination of access charges through the imposition of bill and keep will only serve to increase pressure on the universal service fund. Moreover, the SDPUC does not support increasing the subscriber line charges to

consumers to attempt to make up for shortfalls that would be caused by the elimination of access charges. As previously stated, the SDPUC believes that those who use the network must pay for that use. To place support solely on universal service and end users will only exacerbate the problems already confronting the universal service fund. The SDPUC's concern is that over-reliance on the universal service fund may lead to its collapse or to its being underfunded – either of which scenarios would have devastating consequences to our incumbent carriers and the rural subscribers they serve.

2. Carriers should not be penalized for using centralized equal access tandems

With respect to the issue of technological and competitive neutrality, the SDPUC would like to highlight a flaw in the Inter-carrier Compensation Forum (“ICF”) plan regarding transport that would have serious detrimental effects on our rural carriers.¹² A provision of the ICF plan would require a rural company that uses a centralized equal access tandem to be responsible for all transport costs both to and from the tandem.

The provision reads as follows:

A CRTC [covered rural telephone company] must establish an Edge within each Contiguous Portion of the CRTC's Study Area (as defined in the following paragraph) within a LATA (or, in a non-LATA state, local calling area). However, if a CRTC operates (itself, or with other carriers) and subtends an Access Tandem located outside of a Contiguous Portion of the CRTC's Study Area, the CRTC may designate that Access Tandem as an Edge for traffic originating from or terminating to such Contiguous Portion of the CRTC's Study Area, in which case the CRTC will be financially responsible for all transport costs in both directions on its side of the Access Tandem. *If an Access Tandem is the source of equal access functionality, then the CRTC must designate that Access Tandem as its Edge for carriers that require equal access for interconnection, in which case the CRTC will be financially responsible for all transport costs in both directions on its side of the Access Tandem.*¹³

¹¹ Expanded Portland Group, A Comprehensive Plan for Inter-carrier Compensation Reform, at 12-13.

¹² The Commission notes that the NARUC task force proposal has tentatively adopted ICF's transport and tandem transit proposals. NARUC Task Force Proposal, Version 7, at 13.

¹³ Inter-carrier Compensation and Universal Service Reform Plan at 19, section II.B.2.a. (“ICF Plan”).

As mentioned earlier, years ago our rural companies formed the SDN, a centralized equal access provider, to bring the benefits of long distance equal access to the companies' rural customers. Through the construction and implementation of SDN, interexchange carriers can connect to our rural carriers through SDN to reach rural customers. SDN currently serves 20 rural LECs and three CLECs, and connects IXCs to approximately 160,000 access lines. Not only does SDN provide centralized equal access, it also has nine fiber rings providing redundancy to the carriers who use its network. SDN also offers both LECs and IXCs access to other advanced services such as broadband.

The ICF plan penalizes South Dakota's rural carriers who had the foresight to establish a centralized equal access tandem. The ICF plan switches the transport costs from IXCs to the rural carriers. This proposal inexplicably ignores the real costs that a rural carrier has in transporting traffic to the SDN CEA tandem. The average distance between the SDN tandem and toll connection points in South Dakota is 145 miles. The average distance between toll connection points and the rural LEC end offices is 29 miles. Transporting traffic over these long distances should not be treated as a no-cost service when, in fact, this service is an additional operation with its own costs when compared to states without centralized equal access.

The SDPUC urges the Commission to reject this proposal. This proposal is neither technologically or competitively neutral. Our rural carriers should not be penalized for being progressive through their establishment of a CEA tandem.

C. Minimizing Arbitrage Opportunities

The SDPUC is very interested in proposals which will minimize arbitrage opportunities. This is one of the reasons the SDPUC would be willing to consider joining a voluntary intercarrier compensation regime. Our companies' intrastate switched access rates are higher than the interstate rate. This had led to concerns that some

companies may falsely report their percentage of interstate usage in order to avoid paying the higher intrastate rates. The SDPUC also believes that the elimination of phantom traffic and the inclusion of all traffic that uses the network in an access regime would not only minimize arbitrage but also serve to ease the burden on the universal service fund by ensuring that those who use the underlying network infrastructure help pay for the costs of that infrastructure. We explain our concerns with phantom and VoIP traffic in more detail below.

1. Phantom Traffic

One of the strengths of the EPG proposal is its emphasis on identifying so-called “phantom” traffic. “Phantom” traffic refers to traffic that is terminated on a carrier’s network but does not contain sufficient call detail information to bill the appropriate party. In its *FNPRM*, the Commission discussed this problem with respect to transit carriers. The Commission stated:

We seek further comment on the extent to which billing information in a transiting situation may be inadequate to determine the appropriate intercarrier compensation due, and we ask carriers to identify possible solutions to the extent that billing problems exist today. Specifically, we request comment about whether to impose an obligation on the transiting carrier to provide information necessary to bill, including both the identity of the originating carrier, and the nature of the carrier.¹⁴

In South Dakota our legislature enacted statutes in an attempt to address the problem of phantom traffic.¹⁵ These statutes seek to require that carriers provide sufficient information to allow identification of the traffic.¹⁶ For example, the statute with respect to transit traffic provides:

49-31-112. Transiting carrier required to deliver signaling information with telecommunications traffic--Liability for failure to deliver. A transiting carrier shall deliver telecommunications traffic to the terminating carrier by means of facilities and signaling

¹⁴ *Inter-carrier Compensation FNPRM* at 61, para. 133.

¹⁵ See SDCL 49-31-109 through 49-31-115, inclusive.

¹⁶ These statutes are currently being appealed by Verizon Wireless in federal district court.

protocols that enable the terminating carrier to receive from the originating carrier all signaling information, as required by §§ 49-31-110 and 49-31-111, the originating carrier transmits with its telecommunications traffic. If any transiting carrier fails to deliver telecommunications traffic to another transiting carrier or to the terminating carrier with all of the signaling information transmitted by the originating carrier as required by §§ 49-31-110 and 49-31-111, and this results in telecommunications traffic that is not identifiable and therefore not billable by the terminating carrier to the appropriate originating carrier, the transiting carrier is liable to the terminating carrier for the transport and termination or access compensation relating to the traffic that cannot be identified and billed to the appropriate originating carrier.

These statutes were passed in response to the testimony of our rural carriers that they are losing thousands of dollars a month in lost revenue due to unidentified traffic.

Similar to this South Dakota statute, the Alliance for Rational Inter-carrier Compensation (“ARIC”) proposes holding “tandem owners responsible for inter-carrier compensation payments to the terminating LEC for unidentified or wrongly identified traffic forwarded by these tandem operators.”¹⁷ ARIC states that “[s]uch a rule is appropriate because tandem operators are in the best position to know which carriers are routing improperly or incompletely identified traffic.”¹⁸ ARIC notes that if the tandem operators were responsible for payment then they would have an incentive to stop routing unidentified or misidentified traffic.¹⁹ As stated by ARIC, “[g]reater accountability on the part of all network service providers should improve traffic identification problems dramatically.”²⁰ The SDPUC urges the Commission to join South Dakota and implement procedures to ensure that traffic is appropriately identified and billed.

2. Users of the network infrastructure should pay for that use

Of course, one of the most significant causes of arbitrage is the widely varying rates paid by carriers for similar services. As ARIC aptly summarizes “[t]he crux of the

¹⁷ The Inter-carrier Compensation Reform Plan of the Alliance for Rational Inter-carrier Compensation (“ARIC Reform Plan”), at 55.

¹⁸ *Id.*

¹⁹ *Id.*

problem is that different carriers pay different intercarrier compensation rates to the LEC, or no compensation at all, for the same interconnection services – origination, transport and termination of calls on the PSTN.”²¹ ARIC further describes the problem as follows:

New competitors and technologies have transformed the long-distance market and disrupted traditional compensation regimes for some time. In retrospect, this disruption should have been quite predictable. Traditional long-distance companies have faced fierce price competition from wireless service providers for several years, and now they face similar competition from Voice over Internet Protocol (“VoIP”) providers. This pricing pressure has resulted in the deteriorating financial position of interexchange carriers (“IXCs”) and tariff violations to avoid higher-priced access charges.²²

The SDPUC notes that our wireline network is not only used to provide basic telephone services, but is necessary for the deployment of advanced services, such as broadband. These advanced services are essential for economic development, especially in rural states such as South Dakota. In order to maintain our network infrastructure, the users of that infrastructure must be required to pay for that use. We believe that all types of telephony services, as well as their customers, will benefit from a fair, inclusive rate structure.

D. Ensuring Reasonable and Affordable Rates, Especially for Rural Consumers

In order to achieve the goal of reasonable and affordable rates, especially for rural consumers, the SDPUC urges the Commission to resist the temptation to just shift costs onto the end user. Indeed, one of the reasons that the SDPUC is opposed to bill and keep is the likely result of higher subscriber line charges (“SLC”) to consumers. For example, one of the proposals that advocates a transition to a bill and keep regime would increase the SLC cap on the LEC to \$10.00 in areas served by non-rural carriers

²⁰ *Id.*

²¹ *Id.* at 9.

²² *Id.* at 8.

and up to \$9.00 in areas served by certain rural carriers.²³ The Western Wireless proposal includes similar increases and, at the end of a four year transition, the SLC would be deregulated for any incumbent LEC that is able to demonstrate that it is subject to competition.²⁴

The SDPUC is opposed to proposals that increase the SLC in order to set an access rate of zero. The use of a carrier's underlying network is a cost of doing business. These costs should be reflected in rates charged to all system beneficiaries, not add-ons to end user rates in the guise of "government-mandated" charges.

E. Minimizing the Impact on Universal Service Support Programs

As previously mentioned, one of the best ways to minimize the impact on universal service is to keep an access charge and not transition to bill and keep. Minimizing the impact on the fund will also be accomplished through the application of access charges to all users of the underlying network.

Another way to minimize the impact is to ensure that carriers do not recover more from the fund because the carrier has chosen to charge lower local rates. Although the SDPUC is always concerned about consumer impacts, we recognize that a universal service fund should not be used to subsidize artificially low local rates. Thus, if a carrier is charging low local rates, the carrier cannot make up for those lower rates through high cost funding. A carrier should, however, have the option of charging less than this benchmark. A carrier may need to charge less in order to respond to competition. If a carrier does charge less than the benchmark, the carrier would receive supplemental support based on the benchmark rate, not on the lower rate the carrier actually charged. The SDPUC recommends that the Commission and the state commissions work together to establish benchmark rates.

²³ ICF Plan at 60-63.

²⁴ Western Wireless Intercarrier Compensation Plan at 13.

III. CONCLUSION

The SDPUC would not lightly consider sharing its clear jurisdiction over intrastate switched access rates. But we believe that we should be an active participant in the solution to these problems, not an obstacle. That is why the SDPUC is willing to work with the Commission to alleviate these problems. The SDPUC looks forward to working with the Commission in implementing an intercarrier compensation plan that meets the principles as articulated in these comments.

Respectfully submitted,

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